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NO. 87-1971

IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1987

PATRICIA ANN GRIFFIN,
by and through her next friend and
natural father, LARRY D. GRIFFIN; and
LARRY D. GRIFFIN, individually,

Petitioners,

vs.

FORD MOTOR COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

PETITIONERS' REPLY BRIEF

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ARGUMENT

AN ACCRUED CAUSE OF ACTION IS PROPERTY WHICH MAY NOT BE TAKEN BY THE STATE THROUGH THE RETROACTIVE APPLICATION OF A SUBSEQUENT CHANGE IN THE LAW

Ford's argument indicates a fundamental, if not unique, misunderstanding of the important question of federal law involved in this petition. Patricia Ann does not assert that she acquired a cause of action in tort as a result of the Florida Supreme Court's decision in Battilla v. Allis Chalmers Manufacturing Co., 392 So. 2d 874 (Fla. 1980). [Respondent's Brief in Opposition at 6.] Patricia Ann acquired a common-law cause of action in tort as a result of injuries inflicted upon her by Ford.

At the time Patricia Ann's cause of action accrued, there was a products-liability statute of repose. However, the Florida Supreme Court had five years previous, in Battilla, interpreted the

statute of repose in such a manner that, under the facts of this case, it was unquestionably wholly without effect and, therefore, did not bar the accrual of Patricia Ann's cause of action.

After the accrual of Patricia Ann's cause of action, the Florida Supreme Court, in Pullum v. Cincinnati, Inc., 476 So. 2d 657 (Fla.), reh'g denied mem., 482 So. 2d 1352 (Fla. 1985), appeal dismissed mem., 475 U.S. 1114 (1986), sua sponte reinterpreted the statute of repose in such a manner that, under the facts of this case, it would have barred the accrual of Patricia Ann's cause of action. But the Florida Supreme Court was too late. As a result of certain economic decisions made by Ford, Patricia Ann's cause of action had already accrued.

Patricia Ann does not assert, however, that she was denied due-process rights

when the Florida Supreme Court reinterpreted the applicability of the statute of repose. [Respondent's Brief in Opposition at 6.] Patricia Ann was denied procedural due process when the United States District Court summarily divested Patricia Ann of her accrued cause of action. The district court accomplished this feat by retroactively applying the Florida Supreme Court's new interpretation of the law to Patricia Ann's previously accrued cause of action, thereby denying Patricia Ann a hearing on the merits of her accrued cause of action.

Ford argues that Patricia Ann was not divested of an accrued cause of action because, under the law, she had no cause of action of which to be divested. [Respondent's Brief in Opposition at 9-11.] Ford's argument begs the question and completely sidesteps the issue. Ford

simply ignores the fact that the law under which Patricia Ann has no cause of action was law which did not exist at the time her cause of action accrued. Ford's circular argument is like that of an automobile thief who, having been apprehended, asserts that he cannot have stolen the victim's automobile, for the victim has no automobile to steal.

Ford argues that the denial of certiorari in Clausell v. Hobart Corp., 515 So. 2d 1275 (Fla. 1987), cert. denied mem., 108 S. Ct. 1459 (1988), is dispositive of this petition. [Respondent's Brief in Opposition at 6-7.] In doing so, Ford continues its effort to avoid the issue involved in this petition, an issue which Ford concedes by refusing to address it. In relying on the denial of certiorari in Clausell, Ford overlooks the fact that a denial of certiorari without opinion

"carries with it no implication whatever regarding the Court's views on the merits of a case which it has declined to review." See generally Maryland v. Baltimore Radio Show, Inc., 338 U.S. 912, 917-19 (1950) (Frankfurter, J.) (explaining the multitudinous possibilities behind a denial of certiorari without opinion).

Ford relies primarily on In Re Consolidated United States Atmospheric Testing Litigation, 820 F.2d 982 (9th Cir. 1987) [hereinafter cited as Atmospheric Testing Litigation], cert. denied mem. sub nom. Konizeski v. Livermore Labs, 108 S. Ct. 1076 (1988). [Respondent's Brief in Opposition at 9-14.] The court of appeals in Atmospheric Testing Litigation, however, completely overlooked and, therefore, muddled the distinction between an abstract unaccrued cause of action and an accrued cause of action. See id. at 988-90. Relying

in part on the same authority, the court of appeals below and the Florida Supreme Court in Clausell each made the same error. It is on this fundamental distinction that the decision of the court of appeals conflicts with the precedent of this Court.

More important, however, is the fact that, unlike here, the state did not deprive the plaintiffs in Atmospheric Testing Litigation of their accrued causes of action so as to render those plaintiffs remedyless. Rather, the federal government was substituted as the defendant, and stood in the shoes of the government contractors against whom the actions were brought. See Atmospheric Testing Litigation, 820 F.2d at 987-88.

As explained in Gibbes v. Zimmerman, 290 U.S. 326 (1933), an accrued cause of action is property through which a

plaintiff is guaranteed, if not a particular remedy, then at minimum the preservation of the plaintiff's substantial right to redress through some effective procedure. Id. at 332. That effective procedure may have been provided in Atmospheric Testing Litigation through the substitution of parties, but it certainly has not been provided in the present case. In the present case, no procedure has been provided.

In denigrating the significance of Patricia Ann's cause of action [Respondent's Brief in Opposition at 8], Ford again reveals that sense of values which led to Patricia Ann's injury. Ford apparently sees little value in human life. It cannot be doubted, however, that Ford sees much value in the production of capital at any cost: thus Ford's persistent economic decisions regarding its refusal

to repair, or to warn consumers of, the dangers of its automatic transmission system.

Given Ford's sense of value, one can but wonder what Ford's position would be were the cause of action here involved that of Ford, stemming perhaps from the loss in value of one of its assets by reason of price-fixing on the part of its competitors. Could it be imagined, were a change in the antitrust laws applied retroactively to divest Ford of an accrued cause of action, that Ford would characterize its cause of action, premised on economic value rather than bodily injury, as "insignificant"?

What is significant here is that no cause of action (at least prior to an adjudication on the merits) is insignificant, be it Ford's by reason of the loss in value of one of the numerous

assets listed in Ford's Appendix to its Brief in Opposition, or be it that of a far-from-wealthy young woman who had her entire life ahead of her, and whose life has now been inexorably torn as a result of the corporate greed of Ford. As has been stated again and again throughout this litigation, Patricia Ann's painfully-acquired cause of action is really all that Patricia Ann now has. But if, as Ford has suggested, Patricia Ann's cause of action is not significant enough to merit the protection of due process, then that cause of action might as well be added to Ford's Appendix of assets, because that is precisely where Ford would have it.

This case is significant, however, far beyond Patricia Ann's cause of action. Ford states that there is no conflict with other courts of appeals or with

state courts. [Respondent's Brief in Opposition at 7-8.] The cases cited by Patricia Ann in her petition leave no doubt that an accrued cause of action is property which cannot be taken by the state through the retroactive application of a change in the law. Yet, the court of appeals and the Florida Supreme Court, each with misplaced reliance on the same wholly distinguishable authority, concluded otherwise. Numerous other courts, in reliance on the decisions of the court of appeals and the Florida Supreme Court, are now perpetuating that misplaced reliance.

This case is, therefore, highly significant. With this case this Court can clearly express, in terms which lower courts cannot ignore, the fundamental principle that an accrued cause of action is property which is protected by the due process clauses and which, therefore,

may not be taken by the state through the retroactive application of a subsequent change in the law. In doing so, this Court can see this fundamental principle given flesh, in the form of a single living person, whose life and injury are far from insignificant. It is cases like the present one, after all, which make due process more than simply lofty sentiment.

CONCLUSION

Patricia Ann respectfully requests that this Court grant her petition for a writ of certiorari.

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